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No. 82-65

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARGARET R. BROWN, JUDI KNIGHT, JANE MAXWELL, MARY SHENEFIELD, MARIAN S. STRAUGHAN, SANDRA H. SHUPTRINE, OLIVE J. WHITE,

Appellants,

v.

THYRA THOMSON, as Secretary of the State of Wyoming, et al.

Appellees,

v.

JAMES L. THOMPSON, et al.,

Appellees-Intervenors

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

APPELLEES-INTERVENORS' BRIEF ON THE MERITS

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OPINION BELOW

Brown v. Thomson is reported at 536 F.Supp. 780 (D. Wyo. 1982).

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING..... i

OPINION BELOW..... i

TABLE OF AUTHORITIES..... iv

ADDITIONAL STATUTORY PROVISIONS..... 1

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 4

ARGUMENT

I. THE OVERALL DEVIATION UNDER THE 1981 WYOMING HOUSE APPORTIONMENT IS MINOR AND THE IMPACT ON APPELLANTS IS DE MINIMIS..... 6

ONE STATISTIC..... 9

PRIOR SUMMARY AFFIRMANCE..... 12

MATHEMATICAL EXACTNESS NOT REQUIRED..... 13

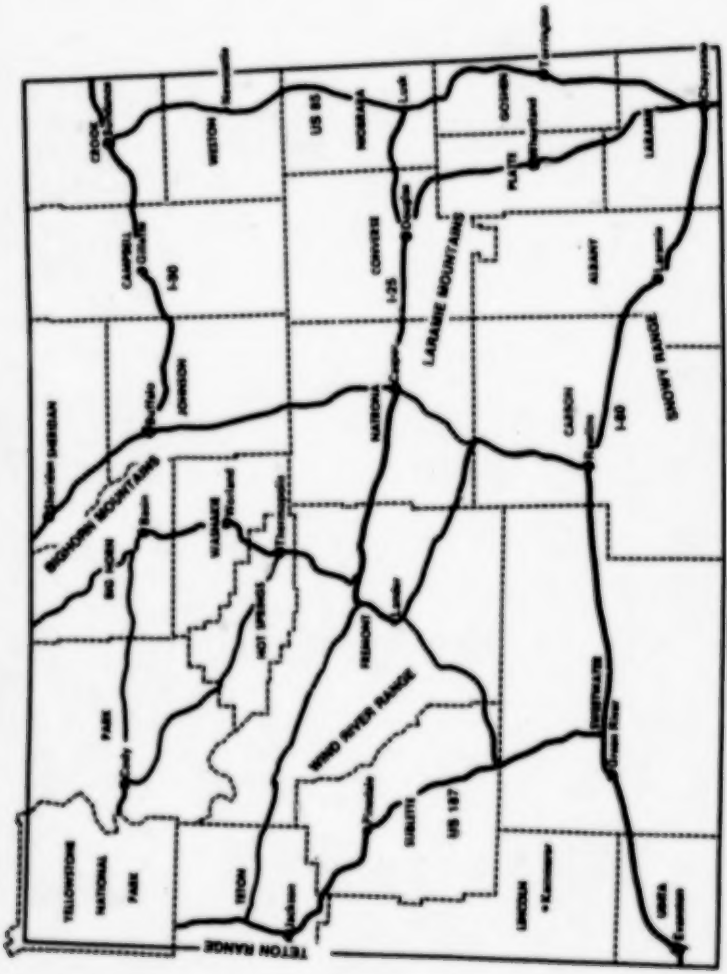
II. THE 1981 REAPPORTIONMENT PLAN PROMOTES THE LEGITIMATE STATE POLICY OF MAINTAINING THE INTEGRITY OF COUNTIES AS POLITICAL SUBDIVISIONS THROUGH DIRECT REPRESENTATION IN THE STATE LEGISLATURE..... 16

NIOBRARA'S UNIQUE AND SEPARATE CHARACTER..... 21

NIOBRARA COUNTY CREATED..... 23

NIOBRARA PROSPERED..... 25

APPENDIX B


STATE OF WYOMING
BIGHORN MOUNTAINS
LARAMIE MOUNTAINS
WIND RIVER RANGE
SNOWY RANGE
TETON RANGE
YELLOWSTONE NATIONAL PARK
I-80
I-25
I-90
US 16
US 14
US 287
US 191
CAMPBELL
JOHNSON
NATRONA
CONVERSE
CARBON
ALBANY
LARAMIE
PLATTE
GOSHEN
WESTON
CROOK
SHERIDAN
BIG HORN
WASHAKIE
HOT SPRINGS
FREMONT
PARK
TETON
SUBLETTE
LINCOLN
SWEETWATER
UINTA

Page

EFFECTIVE REPRESENTATION..... 27

LOWER COURT FINDS
UNIQUENESS AND LEGITIMATE
STATE POLICY..... 34

APPELLANTS ACKNOWLEDGE
UNIQUENESS..... 36

SIMILARITY OF
O'SHIELD V. McNAIR..... 39

PUBLIC BENEFITS..... 42

OTHER U.S. SUPREME COURT
DECISIONS DISTINGUISHED..... 45

CHARACTER OF DEVIATION..... 48

CONCLUSION..... 49

COUNSEL OF RECORD..... 51

CERTIFICATE OF SERVICE..... 52

TABLE OF AUTHORITIES

Page

Abate v. Mundt,
403 U.S. 182 (1971)..... 15

Baker v. Carr,
369 U.S. 186 (1962)..... 13

Brown v. Thomson,
536 F.Supp. 780 (D.Wyo. 1982)....4, 8, 9, 11, 13, 36, 46, 47, 49

Carstens v. Lamm,
543 F.Supp. 68 (D.C. Colo. 1982)...33, 34

Connor v. Finch,
431 U.S. 407 (1977).....46, 47, 48

Dunnell v. Austin,
344 F.Supp. 210 (E.D. Mich 1972).... 33

Dusch v. Davis,
387 U.S. 112 (1967)..... 15

Gaffney v. Cummings,
412 U.S. 735 (1973).....14, 15

Harrison v. Schaefer,
383 U.S. 269, 86 S.Ct. 929
15 L.Ed.2d 750 (1966)..... 12

Kilgarlin v. Hill,
386 U.S. 120 (1967)..... 46

Long v. Avery,
251 F.Supp. 541 (D.Kan, 1966)..... 48

Mahan v. Howell,
410 U.S. 315 (1973).....14, 15, 17, 19

Page

Maryland Citizens Committee for Fair Congressional Redistricting Inc. v. Tawes
253 F.Supp. 731, aff'd sub. nom. Alton v. Tawes, 384 U.S. 315 (1966)..... 34

O'Shield v. McNair,
254 F.Supp. 708 (D. S.Car. 1966)...39, 42

Reynolds v. Sims,
377 U.S. 533 (1964).....14, 18, 46

Roman v. Sincock,
377 U.S. 695 (1964)..... 46

Sailors v. Board of Education,
387 U.S. 105 (1967)..... 15

Schaefer v. Thomson,
251 F.Supp. 450 (D. Wyo. 1965)..... 12

Skolnick v. State Electoral Board of Illinois,
366 F.Supp. 839 (1971)..... 34

Swann v. Adams,
385 U.S. 440 (1967)..... 46

Whitcomb v. Chavis,
403 U.S. 124 (1971)..... 46

White v. Regester,
412 U.S. 755 (1963)..... 15

Wyoming Session Laws
Chapter 76, Section 3..... 1

1981 Apportionment Act.....2, 13

ADDITIONAL STATUTORY PROVISIONS

Appellees-Intervenors set forth the enabling clause, Chapter 76, Section 3, of the Session Laws of Wyoming which expresses the intention of the Legislature to preserve the representation of Niobrara County:

> It is hereby declared the policy of this state is to preserve the integrity of county boundaries as election districts for the House of Representatives. The Legislature has considered the present population, needs, and other characteristics of each county. The Legislature finds that the needs of each county are unique and the interests of each county must be guaranteed a voice in the Legislature. The Legislature, therefore, will utilize the provisions of Article 3, Section 3 of the Wyoming Constitution as the determining standard in the reapportionment of the Wyoming House of Representatives which guarantees each county at least one representative. The Legislature finds that the opportunity for oppression of the people of this state or any of them is greater if any county is deprived a representative in the Legislature than if each is guaranteed at least one representative. The Legislature finds that the dilution of the power of counties which join together in making these declarations is trivial when weighed against the need to maintain the integrity of county boundaries. The Legislature also finds that it is not practical or necessary to increase the size of the Legislature beyond the provisions of this act in

order to meet its obligations to apportion in accordance with constitutional requirements consistent with this declaration.

STATEMENT OF THE CASE

This case involves the issue of the constitutionality of the 1981 Apportionment Act of the Wyoming State Legislature. The Legislature apportioned the House of Representatives so that all of the 23 counties in Wyoming are guaranteed at least one representative.

Appellants filed their Complaint in October of 1981. They did not challenge the overall apportionment plan but simply the grant of one representative to Niobrara County.

In November of 1981, Appellees-Intervenors, who are residents of Niobrara County, and the Board of County Commissioners of Niobrara County, moved to intervene in this lawsuit. Their Motion was granted in January of 1982.

The trial of this matter was held in Cheyenne, Wyoming, on March 11 and 12,

1982, before a three-judge panel consisting of U.S. District Judges Ewing T. Kerr and Clarence A. Brimmer and Judge William E. Doyle of the U.S. Court of Appeals, 10th Circuit.

The lower Court entered its judgment on April 21, 1982, in favor of Appellees-Intervenors and dismissed Appellant's Complaint with prejudice.

The relief Appellants are seeking is the stripping of Niobrara's sole representative and the combination of Niobrara County and neighboring Goshen County into one representative district.

Appellants' challenge is based on the 89% overall relative range of the 1981 House, a statistic that compares favorably with the 86% figure of the 1971 House and the 90% figure of the 1963 House.

The lower court found that the grant of one representative to Niobrara County does not constitute invidious discrimination and is justified by the legitimate state policy of maintaining the integrity of counties as

political subdivsions through direct representation in the State Legislature.

Judges Kerr, Brimmer and Doyle found that the actual dilution of Appellants' voting power is insignificant while the threat of denial of fair and effective representation for the residents of Niobrara is great. Brown v. Thomson, supra.

SUMMARY OF ARGUMENT

I. The statistical deviation of the 1981 Wyoming House from the theoretically ideal district is insignificant when viewed in the context of the total statistical picture.

a) If Niobrara were to be denied all representation in the State Legislature, the seven counties in which Appellants reside would be the beneficiaries of only a .65% improvement in the percentage of representatives elected, a figure which the lower Court found to be trivial and insufficient to constitute invidious discrimination.

b) If Niobrara County were to be completely stripped of representation in the State Legislature, the 0.0003% to 0.0023% improvement

in Appellants' voting strength would be insignificant, particularly since there is no resulting change in the percentage of population required to elect a majority of the House of Representatives.

II. The 1981 Reapportionment plan advances the rational state policy of preserving the integrity of counties as political subdivisions through fair and effective representation in the State Legislature.

a) Wyoming is unique in terms of its sparsity of population and large geographical area, consisting of 23 distinct counties, each with a separate sense of community.

b) Fair and effective representation in Wyoming is synonymous with personal contact between a legislator and his or her constituents who share interests and concerns peculiar to each county.

c) County government in Wyoming is relied upon to provide essential services while the legislature has the responsibility for distributing various tax monies to the individual counties. Niobrara County's sole representative is an important link between the State

Legislature and county and local government. Niobrara County representatives who live and work in Niobrara County are more committed to their constituents because they share a unique community of interest and allegiance with one another.

d) Niobrara County has a unique identity by virtue of history, tradition and accomplishments. The unnecessary fragmentation of Niobrara County would threaten to undermine the stability of the social, economic and political order that is promoted by effective county-by-county representation.

e) The only people who are threatened with injury in this lawsuit are the 3,000 residents of Niobrara County.

ARGUMENT

I.

THE OVERALL DEVIATION UNDER THE 1981 WYOMING HOUSE APPORTIONMENT IS MINOR AND THE IMPACT ON APPELLANTS IS DE MINIMIS.

The opinions rendered in this case, the principal one by Judge Ewing T. Kerr and the

special concurring one by U.S. Circuit Judge William P. Doyle, say a great deal more than the fact that the 1981 Reapportionment of the Wyoming House of Representatives is not unconstitutional. They say that everyone under the scheme of things as they obtain in the State of Wyoming, is entitled to at least some representation in the Legislature. They say, more importantly, that stripping this one county among Wyoming's 23 counties of its sole representation in the State Legislature, of itself would be depriving the citizens of Niobrara County of their rights.

The trial court recognized that if the 3,000 residents of Niobrara County are combined with the more than 12,000 residence of neighboring Goshen County in one representative district, Niobrara County will be permanently disenfranchised from representation in the State Legislature by one of its own. (Tr. 288). Presumably that is what Judge Doyle means when he says that the Legislature's alternative reduction of the number of members from 64 to 63 and the combining of Niobrara County with

Goshen County is not "an attractive option." Brown v. Thomson supra at p. 788.

Judge Kerr decried the alternative of combining Niobrara and Goshen Counties into one legislative district when he said that, "[W]ithout representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten." Id. at p. 784.

The seven Appellants reside in seven of the most populous counties in Wyoming, each of which were represented in the 1981 Legislature by at least one, and in most cases, two members of the State Senate. Niobrara County, on the other hand, has not had the good fortune of being represented in the State Senate by a resident of Niobrara County since 1974 as a result of the merging of Niobrara County and the more populous Converse County into one senatorial district. (Tr. 262-264).

In November of 1982, six of the seven Appellants had the privilege of electing at least three, and as many as nine, of their fellow county residents to the 1983 Wyoming House of Representatives. At the same time

Appellants were electing their multiple representatives to the Wyoming Legislature, Niobrara County was busy choosing its sole voice in the 1983 Wyoming Legislature, a process that has occurred uninterrupted in Niobrara County since its creation in 1911. (Intervening Defendants' Exhibit SS; Tr. 232-233). Yet, Appellants come to this Court asking that the 3,000 residents of Niobrara County be completely stripped of representation in the Wyoming Legislature so that Appellants voting strength can be improved from 0.0003 in Teton County to 0.0023 in Laramie County. (Defendants' Exhibit A-604; Tr. 94-95, 124). "Such minor improvement" Judge Kerr wrote, "hardly reaches the level of significance." Id. at p. 783.

-ONE STATISTIC-

Appellants put all of their eggs in one basket: The "overall relative range" percentage. (Appellants' Brief, pp. 14-15, 17). The overall relative range, which is 89% in this case, represents the percentage deviation from a theoretically ideal district between the most over represented county and the most under represented county. The two counties represent

the extremes of deviation from the ideal districting and all other counties fall between those borders.

The "official divisor" under the 1981 Apportionment is 7,300. The official divisor refers to the number of votes per representative in the theoretical ideal district. Under the 1980 census, Niobrara is the most over represented county with its population comprising 40% of the theoretical ideal district, while Washakie is the most under represented county with its population comprising 129% of the theoretical ideal district.

Appellants recite the 89% overall relative range figure in this case as if it were a magic wand that Judges Kerr, Brimmer and Doyle somehow lost in a mad shuffle of case law. On the contrary, the lower Court was well aware of the 89% overall relative range statistic. It refused, however, to evaluate Appellants single statistic in a vacuum:

> Initially, the 89% relative range figure would appear to conclusively establish a prima facie case and possibly invidious discrimination in the 1981 reapportionment law. A close examination of the other

> relevant statistics, however, soon reveals the fallacy of relying upon only one statistic. Utilizing only the overall relative range figure distorts the picture.

Id. at p. 782.

The seven counties in which Appellants reside elect 28 out of 64 representatives or 43.75% under the 1981 plan. Comparatively, if Niobrara County is denied its own representative, the seven counties in which Appellants reside, which contain 46.3% of the total state population, would elect 28 out of 63 representatives or 44.4% of the House. (Joint Appendix Ex., Vol. 1, p. 19, 21; Defendants' Exhibit A-313, A-315; Tr. 60, 69-70). The Court found that the resulting .65% improvement in the percentage of representatives elected "is trivial but, more importantly, such a percentage is insufficient to constitute invidious discrimination. Rather, the effect on Plaintiffs is best described as de minimis." Id. at p. 783.

The lower Court observed that this is not a case where a small percentage of the population is able to elect a disproportionally

large number of representatives. Id. Under the 1981 plan, 46.65% of the population would elect 33 of 64 representatives. Combining Niobrara with Goshen County in one district would make no change in the percentage of population required to elect a majority of the House of Representatives. Thirty-two of 63 seats would be elected by the same 46.65% of the population under the combined district plan urged by Appellants.

-PRIOR SUMMARY AFFIRMANCE-

Judges Kerr, Brimmer and Doyle put stock in the similarity between the House apportionment in this case and the House apportionment plan before the Court in 1966 in Harrison v. Schaefer, 383 U.S. 269, 86 S.Ct. 929, 15 L.Ed.2d 750 (1966). In Harrison, this Court summarily affirmed the decision authored by Judge Kerr in Schaefer v. Thomson, 251 F.Supp. 450 (D.Wyo. 1965). In Schaefer, the 1963 reapportionment of the Wyoming House of Representatives was found not to be invidiously discriminatory. The 1963 plan provided for 61 representatives. The State of Wyoming had a total population of 329,646. Niobrara County,

with a population of 3,750, had one representative. The official divisor was 5400 people. Four counties fell below the official divisor but each retained its own representative.

Under the 1981 Reapportionment Act, the population of the State of Wyoming was 469,557. The number of representatives was increased to 64. Five counties, including Niobrara County, fell below the official divisor of 7300 and each was given one representative.

The overall relative range of the 1963 House apportionment was 90% as opposed to the overall relative range of 89% in the instant case. The Lower Court concluded that the overall changes between the 1963 House plan, the constitutionality of which was summarily affirmed by this Court, and the 1981 House plan, "have not been of sufficient magnitude to constitute invidious discrimination." Brown v. Thomson, supra at p. 783.

-MATHEMATICAL EXACTNESS NOT REQUIRED-

This Court held that the one-man, one-vote principle enunciated in Baker v. Carr, 369 U.S. 186 (1962) is not meant to be so inflexible as to turn its back on political fairness and the

institutional integrity of legislative bodies in favor of a cold mathematical idealism. Mahan v. Howell, 410 U.S. 315 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973).

Because of the closer relationship between local and state governments, greater flexibility is to be accorded to state as opposed to Congressional reapportionment plans. Reynolds v. Sims, 377 U.S. 533 (1964); Mahan v. Howell, supra at 321.

Recognizing that apportionment cases differ on their facts, this Court has refused to set the kind of arbitrary mathematical standard that would unfairly handcuff a state legislature in a unique case:

> Neither Courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range or percentage deviations is permissible, and what is not.

Mahan v. Howell, supra at 329.

In Gaffney v. Cummings, supra at 749, this Court made it plain that reapportionment plans

are not to be stricken automatically because of a large deviation:

> Fair and effective representation may be destroyed by gross population variances among districts, but it apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may legitimately be mindful of. See, Mahan v. Howell, supra; Abate v. Mundt, 403 U.S. 182 (1971); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Board of Education, 387 U.S. 105 (1967); Burns v. Richardson, supra. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement. [emphasis added].

This Court has clearly stated that although a state reapportionment plan must consider population figures, a deviation of more than 10% may be justified by a showing of a legitimate state interest or policy that is advanced by the apportionment plan. White v. Regester, 412 U.S. 755 (1973); Mahan v. Howell, supra; Gaffney v. Cummings, supra.

In this unique case, the State of Wyoming and Niobrara County articulated, by a wealth of uncontroverted evidence, the existence of a legitimate state policy which is advanced by the 1981 House apportionment plan.

II.

THE 1981 REAPPORTIONMENT PLAN PROMOTES THE LEGITIMATE STATE POLICY OF MAINTAINING THE INTEGRITY OF COUNTIES AS POLITICAL SUBDIVISIONS THROUGH DIRECT REPRESENTATION IN THE STATE LEGISLATURE.

Appellants say there is no legitimate state interest or rational state policy in preserving the integrity of Niobrara County as a separate and independent political subdivision through representation in the State Legislature by one of its own. (Appellants' Brief, pp. 17-20).

Appellants dismiss as "irrelevant historical data" the voluminous evidence in the record concerning the uniqueness of the County of Niobrara and the State as a whole. They object to testimony describing the relationship between the various levels of state and county government which administer to each county's

peculiar social, political and economic needs on a grass roots-home rule basis.

After reading Appellants' conclusory statements denying the existence of a legitimate state policy in this case, Appellees-Intervenors wonder how long Appellants have actually resided in Wyoming and how involved they are in the free political process. The truth in this instance is that the preservation of direct representation of each county in the Legislature is the very glue that keeps the system running and running well in Wyoming.

This Court has already held that the policy of maintaining the integrity of counties as political subdivisions in the process of reapportioning the State Legislature is a rational state interest. Mahan v. Howell, supra.

In Mahan, the Virginia Assembly's apportionment plan had a 16.4% statistical deviation while keeping intact counties as political boundaries. Writing for the majority, Justice Rehnquist held that the apportionment reasonably advanced the rational state policy of

respecting the boundaries of political subdivisions without sacrificing substantial equality:

> We conclude, therefore, that the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that Kirkpatrick and Wells make applicable to congressional reapportionment, but instead by the equal protection test enunciated in Reynolds v. Sims, supra. We affirm its holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." 377 U.S. at 577. We likewise reaffirm its conclusions that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." Id. at 579.
>
> The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be

> said, upon examination of the legislative plan, that it does in fact advance that policy.

Appellants dismiss the precedent of Mahan by noting that Wyoming's Legislature, unlike Virginia's, is not authorized to enact local legislation. Presumably Appellants are arguing that the public benefit of preserving the integrity of counties as political subdivisions is limited to states which authorize local legislation. On the contrary, the benefits which flow from the preservation of the direct representation of each and every county in Wyoming are no less worthy then those which inure to the State of Virginia.

In a state where cattle and sheep are more numerous than people, where neighbors are more often than not separated by great distances, where the social, political and economic character of one county is different from that of an adjoining county, it is important that the voters elect a representative who shares a community of interests with his constituents. The election of a man or woman from within the ranks of each county is the most effective way in Wyoming to maintain the link between the

various levels of state and local government and to promote political accountability on behalf of each county.

Wyoming is unique in that personal contact between representatives and their constituents is still the hallmark of political life in this sparsely populated but large geographic state.

Effective representation in Niobrara County, as in most of the counties in Wyoming, means that your state legislator is your neighbor and usually your friend; he or she drives the same isolated pot-hole filled roads; sends his or her children to the same public schools; attends the same weddings and funerals; sells and buys sheep and cattle at the same auction; screams at the referees at the same high school football games; shops at the same stores; curses the same snow storm in May; and generally speculates whether life really might be more agreeable in Arizona.

This perceived community of interest is the stuff Niobrara County is made from. But the 2,613 square miles of rolling prairie and rich grasslands that became Niobrara County had

an identity of its own long before formal county creation in May of 1911.

-NIOBRARA'S UNIQUE AND SEPARATE CHARACTER-

The town of Lusk, Wyoming, the present day county seat, "has long been at the crossroads of transcontinental trails." (Joint Appendix Ex., Vol. II, Historical Encyclopedia of Wyoming, p. 33; Tr. 210, 232-233). Prospectors gamblers, promotors, hijackers and adventurers, including such notables as Calamity Jane and Wild Bill Hickock, used Lusk as a regular way station on their way to the gold mines of Deadwood, South Dakota. (Joint Appendix Ex. Vol. II, Historical Encyclopedia of Wyoming, p. 34, Tr. 210, 232-233).

The butte rock north of Lusk still shows the deep ruts of the stagecoaches that shuffled gold bricks, freight goods and cowboys to the Cheyenne railroad. Guards rode shotgun on the boot of coaches drawn by fast tandem teams of six horses. George Lathrop, one of the last of the Old West stagecoach drivers, is buried two miles west of Lusk. His stagecoach sits in the Lusk Museum. (Joint Appendix Ex., Vol. II, p. 34; Tr. 210, 232-233).

In 1883, Russell Thorp, Sr., bought the Cheyenne and Black Hills Mail and Express Company, a famous stageline and made Rawhide Station, located near Lusk, his headquarters. Stations for changing horses were located every 18 miles on a trail that runs along the Rawhide Buttes, a striking landmark that rises out of the prairie south of Lusk. (Joint Appendix Ex., Vol. II, Historical Encyclopedia of Wyoming, p. 33-34, Tr. 210, 232-233).

In the fall of 1893, the Johnson County Range War spilled into the Lusk area when a young man was shot out of the saddle on the Horseshoe Ranch. Charlie Hitshew was cleaning a meadow when he heard a shot and found a riderless horse running in circles near the sprawled out body of Dudley Champion, the last man killed in the famous range war. The killer, Mike Shonsey, wasted no time in fleeing to Mexico after being released by the Lusk Sheriff and "a hastily called court." (Joint Appendix Ex., Vol. II, Historical Encyclopedia of Wyoming, p. 35-36, Tr. 210, 232-233).

In the years following the Civil War, cowboys moved huge herds of longhorns north from

Texas to railroad centers and pastures along the Texas Trail which ran through Lusk. When the Fremont, Elkhorn and Missouri Valley Railroad arrived in Lusk on July 13, 1886, the 300 mile round trips to Cheyenne by horse and buggy for beans, flour and other necessities of life stopped and the town became a major railhead for cattle shipping to the eastern markets. (Tr. 214; Joint Appendix Ex., Vol. III, p. 34-35; Lusk Herald, February 18, 1887 issue; Historical Encyclopedia of Wyoming, Tr. 210, 232-233).

As the February 18, 1887 issue of the Lusk Herald, the oldest weekly newspaper in Wyoming, unabashedly proclaims, 40,000 head of cattle were shipped out of Lusk, "[T]he Greatest Stock Shipping Point in the West." (Joint Appendix Ex., Vol. III, p. 3).

-NIOBRARA COUNTY CREATED-

In the years following Wyoming's grant of statehood in 1890, the residents of eastern Converse County, the so-called "east-enders," objected to inclusion in Converse County. The population of eastern Converse County was far more sparse than that of the western part of

the County, which housed the county seat in Douglas, Wyoming.

The east-enders believed that they were the unfortunate recipients of higher taxes, poor roads, inadequate public services and too distant and unresponsive county government (Tr. 215-216, 223, 233; Joint Appendix Ex., Vol. II, p. 6, 9-14, Lusk Herald, June 2, 1910 and April 27, 1911 issues).

After the east-enders waged a vigorous campaign to divide Converse County, the present day Niobrara County was created in the spring of 1911 by an overwhelming 6 to 1 special referendum vote. (Tr. 220-222).

Curiously, the 1910-1911 issues of the Lusk Herald which urged the creation of Niobrara County read as if they rolled off the press the day after Appellants filed this lawsuit:

> Government representation of our own. Instead of voting to elect officers residing in Douglas and the west end to look after our affairs, we will be in a position to elect our own representatives who understand and are interested in our welfare and not that of Douglas. (emphasis added).

(Joint Appendix Ex., Vol. II, p. 10, Lusk Herald, April 27, 1911 issue; Tr. 213, 232-233).

> Each individual is a co-partner in the business about to be set up and each one should therefore take a keen personal interest in the carrying out of the plans of the co-partnership.

(Intervenors' Ex. JJ, Lusk Herald, April 20, 1911 issue; Tr. 221, 232-233).

"East-enders are not asking for anything more than they are entitled." (Joint Appendix Ex., Vol. II, p. 8, Lusk Herald, January 5, 1911 issue; Tr. 213, 232-233).

-NIOBRARA PROSPERED-

In the years following its creation, Niobrara County prospered as a prime cattle and sheep producing area:

> As a grazing county, Niobrara in years gone by had a reputation not only statewide but which reached far beyond its confines and Lusk was the principle shipping point for the great herds which were annually shipped west. A transition has come and although the open range has been curtailed, there will always be leasable land for grazing purposes and more cattle will be fed than formerly so it is wise to conclude that the chief industries of county will still be prosecuted. These are cattle and horse grazing and mutton growing. . . .

(Joint Appendix Ex., Vol. II, p. 15-17, Lusk Herald, September 7, 1911 issue; Tr. 225-226, 232-233).

In 1917 and 1918, Union Oil Company of California and Ohio Oil Company turned the pasture land around Lance Creek in Niobrara into what became known as the Lance Creek Oil Boom. After test wells at Cow Gulch panned out in 1917, rotary drills, casing, pipe, rigs and machinery were unloaded in Lusk and moved to the oil fields by horse and truck. In four days, 555 tons of freight were moved through Lusk alone. Within a year, 25 rigs were operating, a refinery was built and pipe laid to the railroad. By the 1930's and 1940's, Niobrara's Lance Creek Field was first in oil production in Wyoming. (Joint Appendix Ex., Vol. II, p. 36, Historical Encyclopedia of Wyoming; Tr. 210, 232-233, 238-239).

As a result of Niobrara's oil boom and budding cattle and sheep growing industries, Niobrara county experienced a large population growth in the first quarter of the century. The population of Lusk alone swelled from 434 in 1915 to 2,092 by 1920. (Tr. 238-239).

Niobrara's prosperity continued throughout the decades after its creation until the flow of oil and gas tapered off in the 1950's and 1960's and the cattle and sheep industry fell on some hard times. Niobrara's population stabilized during this recent period and it was forced to bite the bullet while much of the State was awash in mineral resource-related economic prosperity and growth.

-EFFECTIVE REPRESENTATION-

During the early growth and development of the county, Niobrarans were particularly concerned that their common interests be fairly and adequately represented. The following excerpt from the June 2, 1910 issue of the Lusk Herald shows that Niobrarans have always recognized the value of being represented by men or women chosen from their own ranks:

> One important item of legislation, and one only, concerns us next winter, and that is the equitable division of Converse County. To further this laudable purpose, we must send a man from this end of the county who has had experience in dealings with men; a man who is a "mixer"; a man who understands the ins and outs of politics; a man who is not easily discouraged; a man who cannot be bribed or swerved from his

> purpose; in short, a man who will have in mind his constituents and their desires "first, last and all the time." What man is there to fill the bill?

(Joint Appendix Ex., Vol. III, p. 6, Lusk Herald, June 2, 1910 issue; Tr. 213, 232-233).

Today while Niobrara County suffers through a prolonged economic downturn, Niobrarans look to their elected representative as the "mixer" who must be counted on to protect their interests.

In practice, Niobrara County's representative acts as the conduit between the Mayor and City Council, the Board of County Commissioners and the various committees of the State Legislature, particularly the Appropriations Committee. (Tr. 276-277, 304-305, 308, 316). This link is especially important in light of the responsibility of the State Legislature for distributing tax monies, including mineral severance and educational foundation revenues, to the individual counties. By the same token, the Board of County Commissioners is charged with the responsibility for allocating available revenue on the local level. (Tr. 310-313).

The Chairman of the Board of County Commissioners of Niobrara County, Kenneth Freeman, whose family first homesteaded in Niobrara County in 1910, explained the nature of the relationship between the Commissioners and the elected representative from Niobrara County:

> Q. In your capacity as Chairman of the County Commissioners, have you had occasions to work with members of Niobrara County's legislative delegation?
>
> A. We worked together always. Les Zumbrunnen was still serving his last term in my first term and we worked together.
>
> Q. What was he in, the House?
>
> A. Les Zumbrunnen was in the House of Representatives and I worked with him. Ken Gropp was elected. You know, the minute the session starts our representative is committed to memory because we talk every day. And Ken Gropp would call me as high as every day to check on specific legislation, and what we thought. So much of the legislation passed by the Legislature and submitted to the Legislature, a lot of people don't check to see what it does to a small county. When it comes to, like mandatory, full-time county attorneys or funding of indigent counsel for indigent people that can't afford their own defense. The Legislature

is very handy in giving but they forget to ask us if we can pay for it. That is why to me it is vitally important to have adequate access to my representative.

Q. Do you know Russ Thompson personally?

A. Absolutely, he ranches about 12 miles northeast of me. I have known him all my life.

Q. Ken Gropp?

A. He's about 10 miles south.

Q. Andy McMaster?

A. All my life.

Q. Does it make any difference in your performance of your duty as County Commissioner that you know these people in a personal way?

A. You bet it does. Russ Thompson has to drive on some of the roads we can't afford to fix, and then when I talk to him in the Legislature, he'll listen.

Q. Are the interests of your constituency in Niobrara County different from the interests of residents of other counties?

A. . . . . to me the vital part is that the constituency that elects me also elects my representative. Consequently, if he is not doing the job, I can let them know. If he is from another county, a Board of Commissioners in my county has no control over the Board of Commissioners in another county. So that is why to

> me it is so important that the constituents that elect me and fellow board members also elect our representative. Then we are responsible to the same people.

(Tr. 313-315).

Other witnesses, including former Niobrara State Senator and Representative James Thompson, former Niobrara legislators Ken Gropp and Russ Thompson and former editor and publisher of the Lusk Herald Gerald Bardo, testified at length to the hitherto unseverable connection in Wyoming between effective representation and representation by one of their own. Their testimony focused on the personal relationship and allegiance of Niobrara County representatives with their constituents, their familiarity with the problems that are peculiar to Niobrara County and the accessibility to a representative who resides in Niobrara County, not Goshen County 60 miles away. (Tr. 262-266, 276, 282-283, 287-288, 304-305, 309-310, 319-320, 325-326).

Mr. Bardo, speaking from the experience of 60 years as a newspaper man, 40 of those in Lusk, Wyoming, testified to the essence of the

unique personal scheme of legislative representation in Wyoming:

> Q. Describe briefly your roll, your function, within the community, within the County of Niobrara as former editor and publisher of the Lusk Herald.
>
> A. Well, you can't be in the newspaper business without being in the middle of everything, including the controversy as well as its joys and its sorrows.
>
> Q. Now do you have a personal relationship with the former and present legislators from Niobrara County that have been discussed in this hearing?
>
> A. That is always imperative, of course. But it's probably more particularly true in a state like Wyoming where you are so closely involved with them. They are your friends, you know them personally. I'm sure they feel a responsibility through the newspaper to the people.
>
> Q. What kind of access have you traditionally had with your legislators? Good ones? Bad ones? Has it been difficult?
>
> A. . . .they are your close personal friends and one of the first places they come as well as all the politicians is to the newspaper office, and they are that close and as close as the telephone always.

Appellees-Intervenors' witnesses testified in detail to the instrumental role that

Niobrara County legislators have played in furnishing special assistance directly to Niobrara County and Lusk, Wyoming, through intense lobbying or enactment and defeat of legislation. For example, in the early 1950's, the Niobrara delegation in the Legislature was successful in their efforts to defeat a bill adverse to Niobrara County which would have ratified the Cheyenne River Compact between Wyoming and South Dakota; passage of the so-called "Lusk Bill" in 1971 which reduced the population requirement for the gas tax refund and resulted in a refund to monies to the Town of Lusk; the location of the new Women's Correctional Center in Lusk; and emergency assistance to Niobrara ranchers in the 1949, 1954, 1955, and 1977 blizzards. (Tr. 247-248, 274-278, 304-305, 308-309, 317, 328-231).

This important connection between effective representation and the preservation of the integrity of the counties as political subdivisions through apportionment has been noted by several lower courts. Carstens v. Lamm, 543 F.Supp. 68 (D.C. Colo. 1982); Dunnell v. Austin, 344 F.Supp. 210 (E.D. Mich. 1972);

Skolnick v. State Electoral Board of Illinois, 336 F.Supp 839 (1971); Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 253 F.Supp 731, aff'd. sub. nom., Alton v. Tawes, 384 U.S. 315 (1966).

In Carstens, District Judge Finesilver wrote that county boundaries "should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation." Carstens v. Lamm, supra at p.88. After noting that unnecessary fragmentation of county units undermines the ability of constituencies to organize effectively, Judge Finesilver stated that: "[A]s a general rule, county lines are more meaningful in sparsely populated areas because the residents rely on the county government to provide all necessary services." Id.

-LOWER COURT FINDS UNIQUENESS AND LEGITIMATE STATE POLICY-

The lower court expounded at length on the establishment by the State of Wyoming and Niobrara County of a rational policy

basis which justifies the statistical deviations under the 1981 reapportionment law:

> Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the state. Each county has its own special economic and social needs. The needs of the people are different and distinctive. Given the fact that the representatives from the combined counties of Niobrara and Goshen would probably come from the larger county, i.e. Goshen, the interests of the people of Niobrara County would be virtually unprotected.
>
> The people within each county have many interests in common such as public facilities, government administration, and work and personal problems. Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures.
>
> In Wyoming, the counties are the primary administrative agencies of the state government. It has historically been the policy of the state that counties remain in this position.
>
> The taxing powers of counties are limited by the Constitution and some state statutes. Supplemental monies are distributed to the counties in accordance with the appropriations designated by the State Legislature. It comes as no surprise that the financial requirements of each county

> are different. Without representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten.

Brown v. Thomson, supra at p. 784.

Judge Doyle also alluded to the uniqueness of the representative scheme in Wyoming when he concluded in his special concurrence that preservation of the integrity of each county as a political subdivision through representation in the State Legislature is part and parcel of fair and effective representation in Wyoming:

> Wyoming has good reasons for clinging to the county as a representative district because this insures that the peculiar needs of each and every county can be represented in the Legislature. Although this might not carry out fully the equality of numbers of voters within the various election districts, it comes close enough to be roughly fair.

Id. at p. 786.

-APPELLANTS ACKNOWLEDGE UNIQUENESS-

Appellants themselves acknowledged the uniqueness and suitability of Wyoming's county-by-county apportionment scheme when their star witness, Wyoming State Legislator Charles Scott, testified, perhaps inadvertently, as follows:

THE WITNESS: I think Wyoming is quite unique in its geography, and circumstances in the point I was trying to make -

JUDGE DOYLE: In other ways, too?

THE WITNESS: I think also unique in having a set of counties that are real communities and where the county lines don't divide any communities that I know of. Although you do have counties that have more than one community in them. And we are, to the best of my knowledge, and its not perfect, we are unique in adhering to county lines in terms of our legislative districts.

JUDGE DOYLE: Then Wyoming lends itself to the county as a unit perhaps better than any other state would?

THE WITNESS: To the best of my knowledge to the extent I have knowledge of other state, yes, that is correct.

(Joint Appendix Ex., Vol. I, pp. 65-66; Tr. 387, 394).

THE WITNESS: . . .The system they use in other states is a good deal more difficult to use than the county system we have here in Wyoming. As I said at the outset, I would point out to the best of my knowledge none of them have the circumstances either geographically or --

(Joint Appendix Ex., Vol. I, p. 67; Tr. 397).

Mr. Scott, one of ten representatives from populous Natrona County and the prime mover in

an unsuccessful attempt in the 1981 Legislature to strip Niobrara of its one representative (Tr. 360-372), is the same person Appellants relied on as their primary rebuttal witness. In his rebuttal testimony, Mr. Scott admitted that the courts are not limited to a consideration of the overall relative range statistic only:

> JUDGE DOYLE: We are not limited to these ratios, that isn't in the Constitution?
>
> THE WITNESS: No sir, it clearly isn't.

(Joint Appendix, Volume I, p. 66; Tr. 395).

Mr. Scott also admitted, albeit somewhat painfully, that when all things are considered, the 64 member plan does not significantly deviate from the 63 member plan which Appellants are urging:

> JUDGE KERR: One legislator out of 64. That doesn't make a lot of difference, does it?
>
> THE WITNESS: It doesn't change the average deviation too much although it does change it. (emphasis added).

(Joint Appendix, Volume I, p. 66; Tr. 395).

-SIMILARITY OF O'SHIELD V. McNAIR-

Mr. Scott's admissions as to the suitability and appropriateness of the county-by-county legislative scheme are consistent with Judge Clement Haynsworth's analysis in O'Shield v. McNair, 254 F.Supp. 708 (D. S.Car. 1966).

O'Shield involved a provision in the South Carolina apportionment plan guaranteeing at least one representative to each of 46 counties. If all the 124 representatives in South Carolina were apportioned on a strict mathematical basis, the smallest county would not be entitled to a representative. Id.

The Court held that since the requirement of one representative for each county affected the present apportionment of only one out of 124 representatives, the dilution of voting power was minimal. Id. In upholding the constitutionality of South Carolina's county-by-county legislative scheme, the Court relied upon the "strong community of interest" in each county, the close correlation between population and representation among all counties when considered in their natural groupings and the fact that in practice the

legislative authority in county affairs is exercised by the county delegation in the state legislature:

> . . .there is a substantial disparity between the smallest county entitled to one Representative and the largest county entitled to only one but which comes close to the line which divides the one Representative counties from the two Representative counties.
>
> * * *
>
> The result of this is that 19 of the 46 counties vary from the population norm by more than 15%. In some instances, the variance is only slightly in excess of 15%. In other instances, it is substantially greater.
>
> * * *
>
> In light of the close correlation between population and representation among all the counties when considered in their natural groupings, we now turn to the question of whether the disparities among individual smaller counties are justified by the state's interest in utilizing the counties as voting districts.
>
> * * *
>
> In South Carolina, the counties are major political subdivisions of the state. They levy and assess taxes, build and maintain those roads which are not incorporated into the national or state highway systems, and supply a multitude of other services to their residents, and to other subdivisions such as school districts.

Each county has a clerk of court, an office for the registration of mesne conveyances, a probate court, a treasurer, an auditor, a sheriff, a supervisor, and other administrative officials. They are selected by popular elections in the counties. Within each county, there is a strong and clearly recognized community of interest, which does not cross county lines.

* * *

There has been no general delegation of legislative authority to the counties. With the exception of a few counties, the legislative authority in county affairs is still vested in the General Assembly. In practice, it is exercised by the county delegation in the General Assembly. When a particular county delegation reaches a conclusion on a county legislative matter, "local" bills are introduced in the General Assembly which are routinely passed in both houses without scrutiny by other members of the General Assemby. Practically, the county's delegation in the General Assembly is its legislative body.

. . .By virtue of the reapportionment of the Senate now being effected, many counties will be left without representation in that body. If such a county were also now left without representation in the House of Representatives, the existing system would break down. From the plaintiff's point of view, if this resulted in an earlier creation of county councils, it is a consequence to be desired, but we think the General Assembly is entitled to determine what, in its opinion, is the

> most desirable method of handling the legislative affairs of the counties. Until some other method is adopted, consideration of the need of individual counties for representation in the House of Representatives is not impermissible.
>
> * * *
>
> Our decision, however, does not turn upon the legislative need of county representation in the House of Representatives, for we think there are other factors which give each county such a strong community of interest as to justify the treatment of each as a separate election district, so long as the disparities between individual counties are not greater or more numerous than they are and so long as a comparison of population and representation for every reasonable grouping of counties shows the close correlation which is now present. emphasis added.

Id. at pp. 716-720.

-PUBLIC BENEFITS-

The important public benefits that Wyoming's unique brand of personal county by county representation confers include the preservation and stabilization of the social, economic and political order, guaranteed in large measure by the exercise of a meaningful voice in the State House.

Proof of the effectiveness of Wyoming's county by county apportionment scheme is apparent in the unusually great number of contributions Niobrara County residents have made to the State through the enactment of legislation and achievements in the fields of medicine, law, government service, agriculture, education and many more.

Niobrara County has been the source of a variety of legislation which has benefited the State as a whole. Such legislation, which was sponsored and managed through both Houses of the State Legislature by representatives from Niobrara County, includes the 1965 repeal of the statutes prohibiting interracial marriages and the 1969 enactment of legislation eliminating architectural barriers for the handicapped in public buildings. (Tr. 245-247).

A variety of legislation that has benefitted the agricultural sector in Wyoming has also originated in Niobrara County. This legislation includes the reimbursement from mineral operators to ranchers and farmers for damages caused by contamination of stock water wells, the preservation of the brucellosis-free

certification system, the first program to treat the leafy spurge weed problem in Wyoming, and the increase of the allowable width of trucks used to haul hay bales in Wyoming. (Tr. 249-253, 306-307, 317-319).

Niobrara County has made substantial contributions to the educational system in Wyoming, including the creation of the first unified county school district in the State in 1949 and the establishment of the Teachers Retirement System. (Tr. 327-328).

Niobrara County has made substantial contributions of state and national leaders including a U.S. Representative, Governor and U.S. Senator, two State Treasurers, a State Auditor, a State Land Commissioner, a State Examiner and a Secretary of State. (Tr. 343-345).

The County has also provided numerous members of state and national boards and commissions including trustees and Board President of the University of Wyoming, commissioners and Chairman of the Highway Commission, Game and Fish Commission, Recreation Commission, delegates to the White House Conference on

Education and Aging and many more. (Appellees-Interventors' Ex. VV; Tr. 336-340).

In the field of law, Niobrara County has contributed to the Federal and State Judiciary and legal system with two State Attorneys General, a U.S. Circuit Court Judge, a State District Court Trial Judge, and numerous attorneys. (Tr. 346).

In the field of medicine, Niobrara County has made contributions far disproportionate to its small population in producing 18 practicing physicians since 1945. (Appellees-Intervenors' Ex. WW; Tr. 340-342).

The life and vitality of Niobrara County that has been so instrumental in encouraging its residents to be participants is unquestionably linked to its political franchise in the State Legislature. Judge Doyle observed as much when he stated during the trial that "it's undesirable to [break up the counties] because I think that there is a natural unity within a county. . . ." (Tr. 139).

-OTHER U.S. SUPREME COURT DECISIONS DISTINGUISHED-

This Court has found the presence of invidious discrimination in several cases where the statistical variances were large and a showing of acceptable state policy was absent. Connor v. Finch, 431 U.S. 407 (1977); Whitcomb v. Chavis, 403 U.S. 124 (1971); Swann v. Adams, 385 U.S. 440 (1967); Kilgarlin v. Hill, 386 U.S. 120 (1967); Roman v. Sincock, 377 U.S. 695 (1964); Reynolds v. Simms, 377 U.S. 533 (1964). However, as Judge Doyle noted in his special concurrence, none of the above cases involved unique elements or the situation of a single county which has received a benefit, as here. Judge Doyle observed that each of the cited cases that were stricken involved widespread "across the board" differences, a situation that is missing here. Brown v. Thomson, supra at pp. 787-788.

In Connor, this Court struck a federal district court's legislative apportionment plan for Mississippi on the ground that the plan violated the Fourteenth Amendment requirement that districts be as nearly of equal population as practicable. Id.

The apportionment plan in Connor was based in part on a deference to Mississippi's historic respect for the integrity of county boundaries. This Court held that a deviation from approximate population equality can be justified by "enunciation of historically significant state policy or unique features," but that Mississippi failed to identify any such unique features of the Mississippi political structure. Id. at pp. 417, 420.

After identifying the unique features of Wyoming's political structure in terms of population and geography and the relationship between each county and the state as a whole, Judge Doyle speculated that the result in Connor "might very well have been different had Mississippi taken pains to call attention to the unique features in the political structure sufficient to justify more than de minimus variations." Brown v. Thomson, supra at p.788.

It is worth noting that this Court paid lipservice in Connor to respect for state legislative judgments and the less stringent standard of review to be applied in state reapportionment cases:

> . . .a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.
>
> . . .The latitude in Court-ordered plans for departure from the Reynolds standards in order to maintain county lines is considerably narrower than that accorded apportionment devised by state legislatures, and that burden of articulating special reasons for following such a policy in the face of substantial population inequality is correspondingly higher. (emphasis added).

Id. at p. 414, pp. 419-420.

-CHARACTER OF DEVIATION-

In evaluating a legislative apportionment scheme, careful scrutiny should be given to the character as well as the degree of deviation from strict mathematical equality. Long v. Avery, 251 F.Supp. 541, 551 (D.Kan. 1966).

In the context of the civil rights movement of the 1960's, the adoption of a narrow and exact mathematical standard was an effective tool to discourage racially-motivated malapportionment. However, Appellees- Intervenors submit that the one-man, one-vote principle was never conceived with the idea that it could be

used to dismantle a unique representative system that is as fair and effective as any in this country.

The deviation in this case is a necessary side effect in assuring meaningful representation to all of the citizens of Wyoming. The only people who can suffer any injury are the 3,000 residents of Niobrara County:

> This brings us back to the present case and the disproportion in a single district. Is it injurious to the remainder of the population of Wyoming? No discomfort is apparent as a result of giving the people of Niobrara County the sorely needed representation. It finally is to be noted and concluded that there is not the slightest sign of any group of people being discriminated against here.

Brown v. Thomson, supra at p. 788.

CONCLUSION

Niobrara County, which comes by its name from the Pawnee Indian words "Ni" for water and "obthatha" for spreading (i.e., the spreading water of the Niobrara River), is a unique and distinct community of history, tradition and accomplishment.

The Historical Encyclopedia of Wyoming describes the people of Niobrara County in these terms:

> The relative isolation characteristic of the area has proven to be its strength, for it forces its people into resourcefulness, producing a vigorous, individualistic, yeasty breed of participants rather than spectators.

(Joint Appendix Ex., Vol. II, p. 38; Tr. 285-286).

Appellees-Intervenors do not and cannot believe that the United States Constitution requires that their special county, of the 23 counties in Wyoming, must be singled out for extinction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Barrett, the attorney for Niobrara County, Appellees-Intervenors herein, hereby certify that on this _____ day of December, 1982, I served copies of the foregoing APPELLEES-INTERVENORS' BRIEF ON THE MERITS on the parties hereto as follows:

1. On Appellants, by mailing copies in a duly addressed envelope, with postage prepaid, to SUE DAVIDSON, Attorney for Appellants, Urbigkit & Whitehead, 405 West 17th Street, Suite 300, P.O. Box 247, Cheyenne, WY 82001.

2. On Appelees-State Officials, by mailing copies in a duly addressed envelope, with postage prepaid to A.G. McCLINTOCK, Attorney General, State of Wyoming, Capitol Building, Cheyenne, WY 82002.

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STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

The foregoing Certificate of Service was acknowledged before me this _____ day of December, 1982, by RICHARD BARRETT.

Sharon L. Bailey
Notary Public

SHARON L. BAILEY NOTARY PUBLIC LARAMIE COUNTY, WYOMING

My Commission Expires:
August 7, 1985